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81-2209

No. .....

IN THE

Supreme Court of the United States

October Term, 1981

Homer M. McDowell, et ux., d/b/a McDowell's and their surety, Travelers Indemnity Co.
Petitioners,

v.

Western Washington Laborers-Employers Health & Security Trust Fund, Western Washington Laborers-Employer Pension Trust Fund, and Western Washington Laborers-Employers Training Trust Fund
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Ninth Circuit
And
Appendix to Petition

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FRAYN PRINTING SEATTLE, WASHINGTON

QUESTION PRESENTED FOR REVIEW

It is a "prehire" collective bargaining agreement, i.e., one permitted by Section 8(f) of the National Labor Relations Act, 29 U.S.C. § 158(f), signed by a labor organization that had not, either at the time of signing of said agreement, or at any later time, been chosen by a majority of the employees purportedly covered by said agreement, enforceable in an action brought under Section 301, Labor Management Relations Act 1947, as amended, 29 U.S.C. § 185?

LIST OF PARTIES TO PROCEEDING BELOW

As required by Rule 21.1(b) of the Rules of the Supreme Court of the United States, a list of the parties to the proceedings below is set forth.

Appellants below:

> John Frodesen, John Duke, Frank Hastie, Dawn Sheffield, Herbert Lobdell, Art Blakenship, Paul McNeil, Wuy Walters, Richard Boursaw, Richard Hutchinson, Ed Motrhersbaugh, Cliff Baker, and Larry Worrell, each as trustee of each of the trust funds.

Appellees below:

> Homer M. McDowell and Lila McDowell, and Travelers Indemnity Co.

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No. .....

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Homer M. McDowell, et ux., d/b/a McDowell's and their surety, Travelers Indemnity Co.
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Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals For the Ninth Circuit

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Homer M. McDowell and Lila McDowell, d/b/a/ McDowells, by their attorneys, respectfully pray that a writ of certiorari issue to review the Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit filed March 2, 1982.

OPINIONS BELOW

This action was commenced in the Superior Court of the State of Washington and removed to the United States District Court for the Western District of Washington, which, on December 14, 1979, entered its ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT (Appendix "B") and JUDGMENT (Exhibit "C") granting a judgment of dismissal to petitioners on the ground that the labor contract sued upon was a minority prehire contract and was unenforceable. The trial court's decision was based upon uncontested and undisputed facts, partly set forth in the affidavit of Homer M. McDowell (Exhibit "D").

By Memorandum (Appendix "A"), the Court of Appeals reversed and remanded for a determination of whether there had been a repudiation of the labor contract by the employer, relying on the rule of the Ninth Circuit, as announced in its decision in *Todd v. McNeff*, 667 F.2d 800 (CA9 1982).

JURISDICTION

The opinion of the Court of Appeals was rendered March 2, 1982, and no petition for rehearing has been filed. This Court has jurisdiction to review by Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

United States Code, Title 29:

> § 185(a) 'Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, with-

out respect to the amount in controversy or without regard to the citizenship of the parties.'

§ 158(f) 'It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in Section 8(a) of this Act as an unfair labor practice) becuase (1) the majority status of such labor organization has not been established under the provisions of Section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organizations an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualification for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to Section 8(a)(3) of this Act: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to Section 9(c) or 9(e).'

STATEMENT OF THE CASE

At all times material, Homer and Lila McDowell are engaged at Milton, Washington, as proprietors in a multifaceted business of house moving, demolition and salvage of wood frame buildings and in the retail and nonretail sale of new and used building materials.

In 1969 Homer M. McDowell signed a document entitled "Compliance Agreement" (herein C/A) by which he adopted as his agreement the agreement negotiated for the geographic area of Western Washington State by chapters of the Associated General Contractors of America (AGC), which purported to govern his laborer class employees engaged in house moving or demolition and salvage. He did not join AGC or give it authority to bargain for his operation.

Since its inception, petitioners regarded the C/A as applicable only to employees who were members of the Laborers Union party to the C/A, applied it to them (including payment of contributions to benefit trust funds) but did not apply it to laborer employees who were not members of the Union. At all times material petitioners employed more laborer employees who were not union members than those who were union members, and the trial court found this to be an undisputed fact.

In 1978 the respondents, third party beneficiary benefit trust funds to the C/A, commenced this action to collect unpaid contributions for the non-union employees for whom no contributions had been made.

The trial court found the C/A to be, at all times, an agreement permitted by Section 8(f) of the National Labor Relations Act, 29 U.S.C. § 158(f), but since the union had never achieved designation from a majority of petitioners' laborer employees, that the C/A need not be honored, and that it was unenforceable absent a showing that majority status had ever been achieved, relying upon this Court's decision in *N.L.R.B. v. Local Union No. 103, Iron Workers* (Higdon Contracting Co.), 434 U.S. 335 (1978).

On appeal to the Court of Appeals for the Ninth Circuit, the decision of the trial court was reversed and remanded. The reversal was founded upon the Ninth Circuit's decision in *Todd v. McNeff*, 667 F.2d 800 (CA9 1982). In *Todd*, the court held minority union prehire agreements enforceable until the employer manifested a repudiation of the agreement, and since the trial court had made no determination as to whether petitioners had repudiated the C/A, that issue was remanded for determination of the trial court.

ARGUMENT FOR GRANTING THE WRIT

A. The Decision Below Conflicts With This Court's Decision In N.L.R.B. v. Local Union No. 103, Iron Workers (Higdon Contracting Co.) 434 U.S. 335 (1978).

In *Higdon* this court reviewed the decision of the National Labor Relations Board (herein the N.L.R.B. or the Board) holding that prehire contracts, although permitted by § 8(f) N.L.R.A., 29 U.S.C. § 158(f), did not ripen into an enforceable contract until the majority status of the union party to the prehire agreement was achieved. This Court approved the Board's holding that minority prehire contracts need not be honored by the employer party to such agreements until they ripen to enforceability by virtue of attainment of majority. In *Todd v. McNeff*, the Ninth Circuit modifies this rule by holding that prehire contracts must be honored, and may be judicially enforced, until there is an open and clear repudiation of the contract by the employer.

The Ninth Circuit misreads this Court's opinion in *Higdon*. In *Higdon* this court went to great efforts to search the origins of our basic collective bargaining law,

and of § 8(f), and set forth a compendium of labor regulation by the United States Congress that shows that employees, as well as employers, were not bound by conduct of minority unions, and that except for the freedom from prosecution for unfair labor practices, § 8(f) breathed no life into minority union agreements. That compendium of law in *Higdon* also held that a majority prehire contract needn't be "honored" until it ripens into a § 9(a), 29 U.S.C. § 159(a), majority union agreement. The contrary holding in *Todd v. McNeff* is plain legal error.

The instant case presents no problems of job-by-job majority, since the undisputed facts raised no issue which might require more litigation under the Board's decisions in *R.J. Smith Construction*, 191 N.L.R.B. 693 and *DeeCee Floor Covering, Inc.*, 232 N.L.R.B. 421 (1977); there was no majority at any time or at any place.

B. National Labor Policy as to Enforceability of Minority Prehire Agreements Is Now Different Before the N.L.R.B. From What It Is Before The Courts In § 301 Actions, And There is Conflict Among The Circuit Courts.

The importance of a single National Labor Policy, drawn from our basic regulatory statutes has been stressed by this court on numerous occasions, one salient example being *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962), saying at page 103:

> The dimensions of § 301 requires the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute. Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of Lincoln Mills, requiring issues raised in suits of a kind covered by § 301 to be decided according to the precepts of federal labor policy.

More important, the subject matter is § 301(a) 'is peculiarly one that calls for uniform law.'

More to the point of one rule of law for N.L.R.B. and § 301 cases was this court's admonition in *Howard Johnson Co. v. Hotel employees*, 417 U.S. 239 (1974) where it was observed at pp.255-256.

> In Textile Workers v. Lincoln Mills, 353 U.S. 448 1 L.Ed.2d 972, 77 S.Ct. 912 (1957), this Court held that § 301 of the Labor Management Relations Act authorized the federal courts to develop a federal common law regarding enforcement of collective bargaining agreements. But Lincoln Mills did not envision any free-wheeling inquiry into what the federal courts might find to be the most desirable rule, irrespective of congressional pronouncements. Rather, Lincoln Mills makes clear that this federal common law must be "fashion[ed] from the policy of our national labor laws." Id., at 456 1 L.Ed.2d 972. Mr. Justice Douglas described the process of analysis to be employed:
>
> > The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory m andates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. Id., at 457, 1 L.Ed.2d 972.
>
> It would be plainly inconsistent with this view to say that the basic policies found controlling in an unfair labor practice context may be disregarded by the courts in a suit under § 301, and thus to permit the rights enjoyed by the new employer in a successorship context to depend upon the forum in which the union presses its claim. Clearly the reasoning of Burns must be taken into account here.

In *Todd v. McNeff* the unfair labor context was ignored by the Ninth Circuit. Until repudiation, employees are

saddled with a union not chosen by a majority of employees. Maybe the court thinks the prehire terms are good terms, maybe better than individual employees, or a majority may negotiate, but the quality of the collective or individual deals is left by law for employees to determine, it is not for the courts or the N.L.R.B.

Unless resolved there will continue to be three inconsistent views as to enforceability of minority prehire contracts under § 301.

One group of courts simply holds that benefit trust funds get more than the union or employer get from such a contract, namely, a completely enforceable contract. *Contractors, Laborers, Teamsters and Engineers Health & Welfare Plan v. Associated Wrecking Co.*, 638 F.2d 1128 (CA8 1981); *New Mexico District Council of Carpenters v. The Mayhew Co.*, 664 F.2d 215 (CA10 1981); *Eastern District Council of Carpenters v. Blake Construction Co.*, 457 F.Supp. 825 (EDVA 1978); *Western Washington Cement Masons Health & Security Trust Funds v. Hillis Homes*, 26 Wash.App. 224, 612 P.2d 436 (WA.App. 1980).

The second view is enforceability until overt repudiation. In addition to *Todd v. McNeff, supra*, are: *W.C. James, Inc. v. Oil, Chemical, and Atomic Workers International Union*, 646 F.2d 1292 (CA8 1981); *Florida Marble Polishers Health & Welfare Trust Fund v. Megahee*, 102 L.R.R.M. 2740 (MD Fla. 1979).

The final position is the only one which comports with *Higdon*, namely that minority prehire contracts are unenforceable, or void, in contract enforcement or unfair labor practice contexts. Joining the trial court in the instant case are: *Washington Area Carpenters Welfare Fund v. Overhead Door Co.*, 488 F.Supp 816 (DCDC 1980);

Baton Rouge Building and Construction Trades Council v. E.C. Shafer Construction Co., 657 F.2d 806 (CA5 1981).

There must be one uniform view of § 8(f) contracts. *Higdon, Overhead Door* and *E.C. Shafer Construction* correctly state and apply it, and upon review here, this court should reaffirm it.

CONCLUSION

For the reasons stated, this Petition should be granted.

Eugene R. Nielson
Counsel for Petitioners

2678F

APPENDIX TO

Petition For Writ Of Certiorari To The United States Court of Appeals For the Ninth Circuit

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Appendix A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WESTERN WASHINGTON LABORERS-EMPLOYERS HEALTH AND SECURITY TRUST FUND, WESTERN WASHINGTON LABORERS-EMPLOYERS PENSION TRUST FUND, and WESTERN WASHINGTON LABORERS-EMPLOYERS TRAINING TRUST FUND,	NO. 80-3024
Plaintiffs-Appellants,	D.C. NO. C78-364S
v.	MEMORANDUM
HOMER M. McDOWELL AND JANE DOE McDOWELL and the marital community comprised thereof, doing business as HOMER M. McDOWELL and/or McDOWELL'S, and TRAVELERS INSURANCE COMPANY,	
Defendants-Appellees	

Appeal from the United States District Court for the Western District of Washington
Morell E. Sharp, U.S. District Judge, Presiding Argued and Submitted July 16, 1981

Before: ANDERSON, NELSON, and NORRIS, Circuit Judges.

The district court granted appellees' motion for summary judgment, reasoning that a pre-hire agreement between a construction industry employer and a union is unenforceable if the union has not represented a majority of the employer's employees. Since that decision, Todd v. McNeff, No. 80-5214, slip op. at 495, 489 (9th Cir. Feb. 8, 1982), has held that § 8(f) pre-hire agreements in the construction industry are enforceable until the employer repudiates the agreement. We therefore reverse. Because the district

court did not decide whether there was a repudiation, we remand for further proceedings.

REVERSED AND REMANDED

2061D

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WESTERN WASHINGTON LABORERS-EMPLOYERS HEALTH AND SECURITY TRUST FUND, WESTERN WASHINGTON LABORERS-EMPLOYERS PENSION TRUST FUND, and WESTERN WASHINGTON LABORERS-EMPLOYERS TRAINING TRUST FUND, Plaintiffs, v. HOMER M. McDOWELL, et ux., d/b/a HOMER M. McDOWELL and/or McDOWELL'S, et al., Defendants.	NO. C-78-364S ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This cause is before the Court on Cross-Motions for Summary Judgment. Fed.

R. Civ. P. 56(c). Being fully advised, the Court does rule as follows:

Plaintiffs' Motion for Summary Judgment is DENIED. Defendant's Motion for Summary Judgment is GRANTED.

This is an action by plaintiff trust funds to enforce a "pre-hire" agreement entered into by the defendant after negotiations with a union that neither represented a majority of the defendant's employees nor was certified as the bargaining represenative by the National Labor Relations Board (N.L.R.B.). Defendant relies upon a recent decision of the United States Supreme Court for the proposition that such agreements are not enforceable contracts unless and until the negotiating union achieves majority

status. N.L.R.B. v. Local 103, 434 U.S. 335, 98 S.Ct. 651, 54 L.Ed. 2d 586 (1978) [hereinafter referred to as Bridge Workers].

Plaintiffs assert that Bridge Workers does not preclude trust funds from asserting their contractual rights as third-party beneficiaries; rights which they allege vest at the moment the agreement is signed. Plaintiffs cite Lewis v. Benedict Coal Co., 361 U.S. 459 (1960), for this principle. Lewis and its progeny appear to this Court to be distinguishable because the agreements there in issue were true collective bargaining agreements negotiated by a union representing a majority of the employees or which had been certified as the bargaining representative by the N.L.R.B.

Here, the defendant paid benefits to the trust funds on behalf of minority-union members for almost ten years, but did not do so for non-union employees. Plaintiffs say that defendant is therefore estopped to deny liability, but Bridge Workers appears to compel a different result in dealing with minority unions. There it is written that

> [t]he employer's duty to bargain and honor the contract is contingent on the union attaining majority support. . .

434 U.S. at 345, 98 S.Ct. at 658, 54 L.Ed. 2d at 596.

Plaintiffs also contend that this Court lacks subject matter jurisdiction to adjudicate contract disputes, at least to the extent that the Court may not declare such an agreement unenforceable or order

the contract rescinded. Trust Fund Services v. Heyman, 88 Wn. 2d 698, 706, 565 P.2d 805, 809-10. There appears to be a conflict of authority between this Court and the Washington Supreme Court as to the role which federal courts may properly exercise in resolving "pre-hire" contract disputes. Compare, Heyman v. Teamsters Local 38, No. 506-73C2 (W.D. Wash., Oct. 24, 1974).

Heyman involved facts quite similar to the case at bar. Actions to compel payments by the employer were initiated by the trust fund in both state and federal court. The state superior court entered judgment against the employer; this Court entered judgment against the trust fund. Only an appeal of the state court decision

was prosecuted. However, the union which had negotiated the "pre-hire" agreement simultaneously filed an unfair labor practice charge against the employer with the N.L.R.B. Finding that its own statute of limitations barred it from considering the fact that the union did not represent a majority of the employees at the time the contract was signed, 29 U.S.C. § 160(b) (1970), the N.L.R.B. declared the contract repudiation to be an unfair labor practice, and it petitioned the Ninth Circuit Court of Appeals for enforcement of its remedial order. The Ninth Circuit refused to enforce the order, holding that this Court's decision was res judicata and binding upon the N.L.R.B. N.L.R.B. v. Heyman, 541 F.2d 796 (9th Cir. 1976).

The Supreme Court of Washington found that the federal decisions were neither res judicata as to the state claims nor persuasive precedent for it to follow. It proceeded to reach a contrary determination on the issue of federal jurisdication over "pre-hire" contracts. Fortunately, the Supreme Court of the United States has now clarified the law in this area.

In Bridge Workers, supra, the union made the argument plaintiffs make here that if an employer may repudiate a "pre-hire" agreement until the union attains majority support, it would for all practical purposes render such contracts unenforceable. This result was thought to be inconsistent with a prior Supreme Court decision holding that federal courts have

jurisdiction under 29 U.S.C. § 185(a) to hear lawsuits between employers and minority unions, as well as those between majority-designated collective-bargaining units. Retail Clerks International Ass'n v. Lion Dry Goods, Inc., 369 U.S. 17 (1962).

In rejecting this argument, the Supreme Court said:

> That a court has jurisdiction to consider a suit on a particular contract does not suggest that the contract is enforceable. It would not be inconsistent with Lion Dry Goods for a court to hold that the union's majority standing is subject to litigation in a [§ 185(a)] suit to enforce a ["pre-hire" contract], just as it is in a [N.L.R.B.] unfair labor practice proceeding, and that absent a showing that the union is the majority's chosen instrument, the contract is unenforceable.

434 U.S. at 351-52, 98 S.Ct. at 661, 54 L.Ed. 2d at 599 (emphasis supplied).

There is no dispute over the material fact that the union which negotiated the "pre-hire" agreement at bar did not represent a majority of the employees. Bridge Workers permits the defendant to set up the defense of non-majority status as a bar to enforcement of the agreement. This Court does not agree with Carpenters Dist. Council v. Blake Construction Co., 99 L.R.R.M. 3257 (E.D. Va. 1978), that Bridge Workers is distinguishable.

Accordingly, plaintiffs' Motion for Summary Judgment is DENIED and defendant's Motion for Summary Judgment is GRANTED.

The Clerk of this Court is directed to enter judgment for the defendant and is further directed to send copies of this

Order and of the judgment to all counsel of record.

DATED at Seattle, Washington, this 14th day of December, 1979.

UNITED STATES DISTRICT JUDGE

2063D

Appendix C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WESTERN WASHINGTON LABORERS-EMPLOYERS HEALTH & SECURITY TRUST FUND, et al,	)	NO. C78-364S
Plaintiffs,	)	JUDGMENT
v.	)	
HOMER M. McDOWELL, et al.,	)	
Defendants.	)	

This matter having come on for consideration before the Court, Honorable Morell E. Sharp, presiding, and the issues having been duly considered and a decision having been duly rendered,

IT IS HEREBY ORDERED AND ADJUDGED, that defendants' motion for summary judg-

ment is GRANTED and plaintiffs' cause of action is hereby DISMISSED.

DATED this 14th day of December, 1979.

Deputy United States District Clerk

2069D

Appendix D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WESTERN WASHINGTON LABORERS-EMPLOYEES HEALTH & WELFARE TRUST FUND, etc.,	)	NO. C78-364
Plaintiff,	)	AFFIDAVIT OF HOMER M. McDOWELL
v.	)	
HOMER M. McDOWELL, etc.,	)	
Defendants.	)	

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

HOMER M. McDOWELL, being duly sworn, deposes:

At all times material I have been the sole proprietor of an enterprise often referred to as McDowell's House Moving.

At the time I signed the document attached hereto and marked Exhibit A called Washington State District Council of Laborers Compliance Agreement, I employed various numbers of common labor employees at various times of the year from the year 1969 through and continuing in the year 1978. All during this time I employed only one employee who was a member of the Union affiliated with the Washington State District Council of Laborers, namely, Delton McDowell, with the exception that there might have been a few times when I employed both Delton McDowell and his son, Harry L. McDowell who might also have been a member of the Union. In each and ever year, however, even when I might have employed both Delton and Harry McDowell at the same

time, I also employed more than two other common labor employees who to my knowledge were not Union members.

At no time since I signed Exhibit A has there ever been a National Labor Relations Board certification election held among the employees I have employed as common laborers.

At no time since I signed Exhibit A, did the Laborers Union present to me evidence that a majority of the laborers that I employed had joined the Laborers Union or otherwise designated the Laborers Union to be their representative to bargain with me for purposes of collective bargaining. In fact, at the time I signed Exhibit A there was no discussion whatsoever as to the number of employees, if any, who had designated the Laborers Union

to be their representative, nor to my recollection has there ever been such a conversation with any Union representative since I signed Exhibit A.

HOMER M. McDOWELL

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

SUBSCRIBED AND SWORN TO before me this 27th day of September, 1978.

NOTARY PUBLIC in and for the State of Washington residing at Bellevue

2070D

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CLERK

No. 81-2209

In the Supreme Court of the United States

October Term, 1981

HOMER M. MCDOWELL, et ux., d/b/a
MCDOWELL'S AND THEIR SURETY,
TRAVELERS INDEMNITY CO.
Petitioners,
v.
WESTERN WASHINGTON LABORERS-EMPLOYERS
HEALTH & SECURITY TRUST FUND, WESTERN
WASHINGTON LABORERS-EMPLOYERS
PENSION TRUST FUND, AND WESTERN
WASHINGTON LABORERS-EMPLOYERS
TRAINING TRUST FUND
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI To the United States Court of Appeals For the Ninth Circuit

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QUESTION PRESENTED FOR REVIEW

Petitioner argues that,

> "In *Higdon* this court reviewed the decision of the National Labor Relations Board (herein the N.L.R.B. or the Board) holding that prehire contracts, although permitted by §8(f) N.L.R.A., 29 U.S.C. §158(f), did not ripen into an enforceable contract until the majority status of the union party to the prehire agreement was achieved. This Court approved the Board's holding that minority prehire contracts need not be honored by the employer party to such agreements until they ripen to enforceability by virtue of attainment of majority. In *Todd v. McNeff,* the Ninth Circuit modifies this rule by holding that prehire contracts must be honored, and may be judicially enforced, until there is an open and clear repudiation of the contract by the employer."

Petitioner also asserts that this decision conflicts with national labor policy and with other Circuit Court decisions. The question presented to this Court is framed by the Petitioner as follows:

> "It is a 'prehire' collective bargaining agreement, i.e., one permitted by Section 8(f) of the National Labor Relations Act, 29 U.S.C. §158(f), signed by a labor organization that had not, either at the time of signing of said agreement, or at any later time, been chosen by a majority of the employees purportedly covered by said agreement, enforceable in an action brought under Section 301, Labor Management Relations Act 1947, as amended, 29 U.S.C. §185?"

The soul of the Petitioner's argument is that *Higdon* renders prehire agreements *void* and unenforceable by any party, in any forum, for any purpose.

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No. 81-2209

In the Supreme Court of the United States

October Term, 1981

HOMER M. MCDOWELL, et ux., d/b/a MCDOWELL'S AND THEIR SURETY, TRAVELERS INDEMNITY CO.
Petitioners,

v.

WESTERN WASHINGTON LABORERS-EMPLOYERS HEALTH & SECURITY TRUST FUND, WESTERN WASHINGTON LABORERS-EMPLOYERS PENSION TRUST FUND, AND WESTERN WASHINGTON LABORERS-EMPLOYERS TRAINING TRUST FUND
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI To the United States Court of Appeals For the Ninth Circuit

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondents Western Washington Laborers-Employers Health & Security Trust Fund, et al., by their counsel, respectfully request that the petition for writ of certiorari to review the Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit filed March 2, 1982 be denied, or that the opinion be summarily affirmed.

STATEMENT OF THE CASE

In January, 1969, the Petitioner signed a compliance agreement with Local Union 252 of the Washington State District Council of Laborers ("Union"). The compliance agreement bound Petitioner to abide the terms and conditions of the current, and subsequent, area wide agreements which the Union independently negotiated with the Associated General Contractors of America covering the Western Washington geographical area. These area wide agreements required the Petitioner to make monthly fringe benefit contribution payments and incorporated the trust agreements establishing the Respondent Trust Funds. The Respondents are third party beneficiaries of the agreements and are joint labor-management trust funds created in accordance with Section 302(c)(5) of the Labor Management Relations Act ("Act"), 29 U.S.C. §186(c)(5).

Throughout the 1969-1978 period, Petitioner completed monthly trust reporting forms, certified its payment of all amounts due, and paid the escalating contribution rates required by the successive area wide agreements. Neither party gave written notice of termination, and the agreement continued uninterrupted from 1969.

In 1978, the Respondents asked to review Petitioner's payroll records to ensure proper reporting and contribution payments. After Petitioner denied voluntary production, this action was commenced in the Superior Court for the State of Washington to compel production and to recover any amounts due. The Petitioner removed this action to federal court. Jurisdiction of the suit was based upon Section 301(a) of the Act, 29 U.S.C. §185(a).

In answer to the complaint, the Petitioner asserted an affirmative defense that the compliance and area wide agreements were void and unenforceable because the Union had never represented a majority of his laborer employees. This defense had not been previously raised, and was offered shortly after this Court's decision in *N.L.R.B. v. Local Union No. 103, Ironworkers (Higdon Contracting Co.)*, 434 U.S. 335 (1978). Peti-

tioner contended that he was entitled to pay contributions only for his Union member laborer employees, although the agreements expressly required payment for all laborers without regard to union affiliation. The advantage of medical and retirement benefits available to Union member laborers who were reported to the Trust Funds were denied to those who were not reported.

The Parties[1/] acknowledged that the Petitioner's agreement was a prehire agreement, but differed as to the legal effect of this fact. Cross motions for summary judgment on the liability issues were filed in October, 1978. The district court granted summary judgment in favor of Petitioner in December, 1979 and dismissed the complaint prior to discovery regarding damages. Appeal from this judgment was taken in January, 1980, and the matter reversed by the Ninth Circuit on March 2, 1982. The case is on remand for consideration of whether the agreements were ever repudiated,[2/] and for a determination of damages.

SUMMARY OF ARGUMENT

The district court erred in applying *Higdon,* an illegal picketing case, to bar a §301(a) suit by third party beneficiary trust funds to recover past due fringe benefit contributions. The Ninth Circuit's decision that prehire agreements are retroactively enforceable properly applies *Higdon,* is consistent with our national labor policy, and satisfies Congressional concerns about this case.

[1/] The Union was not party to this action.

[2/] *Todd v. McNeff,* 667 F.2d 800 (9th Cir. 1982) was authority for the Court's decision.

ARGUMENT AGAINST GRANTING THE WRIT

A.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED, AS THE DECISION OF THE NINTH CIRCUIT POSES NO CONFLICT WITH THE *HIGDON* DECISION

Petitioner's assertion that *Higdon* renders prehire agreements void and unenforceable until a union achieves majority status is contrary to Mr. Justice White's declaration that:

> "Until that time [union's attainment of majority support] the prehire agreement is *voidable* and does not have the same stature as a collective bargaining contract entered into with a union actually representing a majority of the employees and recognized as such by the employer." [434 U.S. at 341] (emphasis added)

In response to the union's argument that the decision rendered prehire agreements nullities, Justice White later responded:

> "The Board's position does not, as respondents claim, render §8(f) meaningless. Except for §8(f), neither the employer nor the union could execute prehire agreements without committing unfair labor practices. Neither has the Board challenged the *voluntary observance* of otherwise valid §8(f) contracts, which is the normal course of events. [434 U.S. at 349] (emphasis added)

In *McDowell, McNeff,* and *Paddack v. Clark,* No. 80-3380 (9th Cir. 2 Mar. 1982),[3/] the Ninth Circuit has adopted a view consistent with *Higdon* that prehire agreements are voidable and retroactively enforceable by employee benefit trust funds until there is an effective repudiation. This is also consistent with related

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[3/] Petitions for writs of certiorari have been filed in *McNeff v. Todd,* (No. 81-2150) and *Clark v. Paddack,* (No. 81-1946).

decisions of the Eighth, Tenth and District of Columbia Circuits.[4/]

Higdon provides little support for Petitioner's argument. The word "unenforceable" appears only twice, and then only in the Court's response to the union's assertion that the decision rendered prehire agreements unenforceable, contrary to *Retail Clerks v. Lion Dry Goods, Inc.*, 369 U.S. 17 (1962). Justice White correctly observed that the single issue in *Lion Dry Goods* was whether jurisdiction under §301(a) of the Act existed in a suit by a minority union against an employer to enforce a strike settlement agreement, the contention being that a §301(a) jurisdiction obtained only in suits involving collective bargaining agreements with majority unions. The Justice stated:

> "The Court [in *Lion Dry Goods*] was nevertheless speaking to an issue of jurisdiction. That a court has jurisdiction to consider a suit on a particular contract does not suggest that the contract is enforceable. It would not be inconsistent with *Lion Dry Goods* for a court to hold that the union's majority standing is subject to litigation in a §301 suit to enforce a §8(f) contract, just as it is in a §8(a)(5) unfair labor practice proceeding, and that absent a showing that the union is the majority's chosen instrument, the contract is unenforceable." [434 U.S. at 351-2]

Within the context of the facts presented in *Higdon*, this language is dictum.

In *Higdon*, the Court limited its review to a determination of whether the NLRB correctly decided that the union engaged in recognitional picketing, without a showing of majority support

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[4/]See *Contractors, Laborers, Teamsters and Engineers Health and Welfare Plan, et al. v. Associated Wrecking Company*, 638 F.2d 1128 (8th Cir. 1981); *New Mexico District Council of Carpenters v. The Mayhew Company*, 664 F.2d 215 (10th Cir. 1981); and *Washington Area Carpenters Welfare Fund, et al. v. Overhead Door Co. of Metropolitan Washington*, No. 80-1501 (D. C. Cir. 15 June 1982).

of the employees, thereby violating §8(b)(7)(C) of the Act, 29 U.S.C. §158(b)(7)(C). The Court stated that:

> "The issue for the Board was whether for the purposes of §8(b)(7)(C), the union pickets carrying signs asserting that Higdon was violating an agreement with the union were picketing with the forbidden purpose of requiring Higdon to recognize or bargain with the union." [434 U.S. at 341]

The lead-in phrase of the dictum "(I)t would not be inconsistent with *Lion Dry Goods* for a court to hold . . ." is drawn in the subjunctive. *Higdon* does not hold that prehire agreements are void and unenforceable in §301(a) cases. This fact was misunderstood by the district court, and its error properly corrected by the Ninth Circuit. Since the decisions do not present the conflict asserted by the Petitioner, there is no basis for certiorari.

B.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED, AS THE DECISION OF THE NINTH CIRCUIT IS IN ACCORDANCE WITH THE NATIONAL LABOR POLICY AND SATISFIES CONGRESSIONAL CONCERNS ABOUT THIS CASE

The Ninth Circuit's decision fosters employee freedom, and conforms with Congressional pronouncements of public policy endorsed by this Court.

1. Considerations of Employee Free Choice

Petitioner asserts that this decision defeats the right of employees to select their own collective bargaining representative. To the contrary, in *McNeff,* the Ninth Circuit recognizes the limits placed on minority unions by prehire contracts:

> ". . . allowing a repudiation by the employer, but enforcing the contract until that repudiation occurs seems a cor-

> rect reading of *Higdon*. A minority union will not be able to control an employment situation because an employer can repudiate." [667 F.2d at 303]

Implicit in this language is the understanding that a prehire agreement is not a bar to a petition for a representation election. This follows Justice White's declaration that:

> ". . . a §8(f) contract, which would be invalid absent the section, 'shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).' The employer and its employees and the union itself for that matter—may call for a bargaining representative election at any time." [434 U.S. at 345]

Indeed, in *McDowell* and *McNeff*, considerations of employee freedom are maximized. The Respondent Trust Funds provide benefits to all covered employees without regard to union affiliation. The Petitioner's "union-only" application of the contract poses the greatest danger to employee freedom. By limiting benefits to union members, the Petitioner encourages union membership.[5/]

2. Considerations of Public Pension Policy

On September 26, 1980, the Multiemployer Pension Plan Amendments Act of 1980, Public Law 96-364, 94 Stat. 1208-1311 (1980) (hereafter "MPPAA"), was signed into law. This legislation modified the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 et seq., (hereafter "ERISA"), to provide an express and unambiguous federal cause of action in favor of jointly-trusteed funds against employers to recover delinquent fringe benefit contributions.

Section 306 of MPPAA, 94 Stat. 1295, makes an employer's failure or refusal to pay promised contributions a substantive statutory violation of ERISA, and expands the remedies available to plans in enforcement of contribution obligations. Section 306 enacts a new section of ERISA which states in pertinent part:

[5/]This conduct also constitutes an unfair labor practice under §8(a)(3) of the Act, 29 U.S.C. §158(a)(3).

"Sec. 515. Every employer who is obligated to make contributions to a multiemployer plan under the terms of a collectively bargained agreement shall to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement." [29 U.S.C. §1145]

During Senate debate on this legislation, Senator Harrison A. Williams, a sponsor of MPPAA, explained the legislative purpose of §306 with particular regard to the instant case and the *Higdon* defense upon which it was based:

"Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. Some simple collection actions brought by plan trustees have been converted into lengthy, costly, and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions. This should not be the case. Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously, and without regard to issues which might arise under labor-management relations law—other than 29 U.S.C. §186. *Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises.*

In this regard we endorse judicial decisions such as *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960); *Lewis v. Mill Ridge Coals, Inc.*, 298 F.2d 552 (6th Cir. 1962); and *Huge v. Long's Hauling Company, Inc.*, 590 F.2d 457 (3rd Cir. 1978). Cases such as *Western Washington Laborers-Employers Health and Security Trust Fund v. McDowell*, _____F. Supp._____, 103 LRRM 2219 (W.D. Wash., 1979) and *Washington Area Carpenters Welfare Fund, et al. v. Overhead Door Company*, C.A. No. 79-0097, U.S.D.C. D.C., April 22, 1980, are considered to have been incorrectly decided and this legislation is intended to clarify the law in this respect by providing a direct, unambiguous ERISA cause of action to a plan against a delinquent employer.

> These same principles apply to a plan's claim for employer withdrawal liability assessed in accordance with this legislation. *The public policy of this legislation to foster the preservation of the private multiemployer plan system necessitates that provision be made to discourage delinquencies and simplify delinquency collection.* The bill imposes a Federal statutory duty to contribute on employers that are already obligated to make contributions to multiemployer plans. A plan sponsor that prevails in any action to collect delinquent contributions will be entitled to recover the delinquent contributions, court costs, attorney's fees, interest on the contributions owed and liquidated damages. The intent of this section is to promote the prompt payment of contributions and assist plans in recovering the costs incurred in connection with delinquencies." [126 Cong. Rec. S. 11673 (daily ed., August 16, 1980)] (emphasis added.)

The public policy favoring reversal of a case has seldom been so clear. Respondents suggest that the Ninth Circuit's decision was *mandated* not only by these Congressional pronouncements, but also by the later declarations of this Court in *Kaiser Steel Corporation v. Mullins*, _____U.S._____, 70 L.Ed.2d 833, 102 S.Ct. 851 (January 13, 1982). While defenses of illegality (not involved here) may be cognizable in an action of this type, union majority defenses are not. Instead, they are deemed "unrelated" and "extraneous." See *Mullins*, 70 L.Ed.2d at 846.

The Ninth Circuit's decision joins *Mullins* and MPPAA in reaffirming the precepts of *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960). An employer's promise to pay fringe benefit contributions is inviolate in these circumstances. Since the decision is consistent with the public policy declared by Congress, and endorsed by this Court, a writ of certiorari is unwarranted.[6] As Mr. Justice Marshall recently observed in another ERISA case:

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[6] The conflict presented by the Fifth Circuit's decision in *Baton Rouge Building Trades Council v. E.C. Shafer Construction Company*, 652 F.2d 806 (5th Cir. 1981) is not a sufficient basis for certiorari in light of these recent policy pronouncements.

"Our judicial function is not to second-guess the policy decisions of the legislature no matter how appealing we may find contrary rationales." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 68 L.Ed.2d 402, 415 (1981).

CONCLUSION

For the reasons stated, this Court should deny the writ for certiorari. Alternatively, Respondents request that the Ninth Circuit's decision be summarily affirmed on the basis of §306 of MPPAA.

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